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No. _____

In The

# Supreme Court of the United States

EDWARD SMITH,

*Petitioner,*

v.

AMERICAN ARBITRATION ASSOCIATION, INC.

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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May 2006

## QUESTION PRESENTED

Whether or not the arbitrator engaged in nonjudicial actions?

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## PETITION FOR WRIT OF CERTIORARI

Edward Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinions of the court of appeals (App., infra, 1-3) are reported, respectively, in 689 F.2d 562, 586 (5th Cir. 1982); 502 U.S. at 12; 149 F.3d 330, 332 (5th Cir. 1998) and 959 F.2d 1344, 1345 (5th Cir. 1992).

## JURISDICTION

The court of appeals denied the petition for rehearing en banc and entered its denial on March 6, 2006 (App., infra, 26). The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

## STATUTORY PROVISION INVOLVED

Federal Rule of Civil Procedure 60(b)(3), provides, in relevant part, "on motion and upon such terms as are just, the court may relieve a party from a final judgment for fraud."

## STATEMENT

The arbitrator presented an order that all deadlines will be strictly enforced (App., infra, 38). The Respondents,

Shell Chemical Plant and Burns International Security failed to provide the Petitioner's interrogatories and production of documents within the time allowed for discovery. Petitioner, Edward Smith filed a motion for contempt with the American Arbitration Association, requesting that Respondents be stricken of all defenses, witnesses, and exhibits. The award by the American Arbitration Association was obtained by fraud, as a result of the arbitrator failing to take judicial actions on the motion for contempt, and according to the transcript as direct evidence states in his own words, "I don't have the power to hold a party or an attorney in contempt."

### A. The Complaint of Edward Smith

This case involves a "Motion for Contempt" filed by Petitioner Edward Smith with the American Arbitration Association. In his motion, Smith himself requests that Respondents be stricken of all defenses, witnesses, and exhibits. The arbitrator failed to take judicial actions on the motion for contempt, and according to the transcript (App., infra, 29) as direct evidence states in his own words, "I don't have the power to hold a party or an attorney in contempt."

### B. Proceedings Below

In this case, the arbitrator issued a written ruling on January 26, 2004, in favor of Respondents, Shell Chemical Plant and Burns International Security, denying Petitioner's claims for wrongful termination, defamation and discrimination. On May 3, 2004, Smith filed a petition for relief from judgment under Fed. R. Civ. P. 60(b)(3) against the American Arbitration Association, Shell Chemical

Plant and Burns International Security. The district court entered its judgment on August 30, 2004, dismissing Smith's claims with prejudice. On September 20, 2004, Smith filed a motion for relief from judgment under Fed. R. Civ. P. 60(b)(3). The district court entered an order denying Smith's motion on September 22, 2004. On October 8, 2004, Smith appealed that denial, and the court of appeals entered its judgment on February 6, 2006, affirming the district court's dismissal of Smith's claims. On February 17, 2006, Smith filed a petition for rehearing en banc. The court of appeals denied Smith's petition and entered its denial on March 6, 2006.

## REASONS FOR GRANTING THE PETITION

The district court decision (App., infra, 6) in this case conflicts with *Mireles v. Waco*, 502 U.S. 9 (1991), a prior decision of this Court. The lower court departed from the accepted and usual course of judicial proceedings, and therefore it is necessary to call for an exercise of this Court's supervisory power. This case is a rare opportunity for the Court to address the issue previously determined by this Court to secure and maintain uniformity of the Court's decisions. Moreover, the decision below conflicts with relevant decisions of this Court, and the issue that it addresses is important.

### I. The Decision of the Court of Appeals Conflicts With a Prior Decision of this Court.

In *Mireles v. Waco*, 502 U.S. 9 (1991), the Court determined that "arbitral immunity can be overcome where the arbitrator is engaged in nonjudicial actions."

The arbitrator is not immune from liability for nonjudicial actions, i.e., actions not taken in the arbitrator's judicial capacity.

In this case, the Arbitrator Sid Moller failed to take judicial actions on Smith's motion for contempt, and according to the transcript as direct evidence states in his own words, "I don't have the power to hold a party or an attorney in contempt." If in fact, had the arbitrator taken judicial actions on Smith's motion for contempt, Smith would have prevailed in arbitration. Therefore, the arbitrator engaged in nonjudicial actions, and the American Arbitration Association is not immune from civil liability and is liable unto Smith for damages.

## II. The Court of Appeals Was Bias in Failing to Consider the Facts and Direct Evidence of this Case.

On February 17, 2006, the Petitioner, Edward Smith filed a Petition for Rehearing En Banc to the United States Court of Appeals for the Fifth Circuit. The petition presented the question, "whether the arbitrator engaged in nonjudicial actions." In support of the question presented which included the transcript as direct evidence, the arbitrator states, "I don't have the power to hold a party or an attorney in contempt."

Prior to the filing of the petition for rehearing en banc, the court of appeals denied Smith's motion for leave to proceed in forma pauperis and dismissed his appeal as frivolous. In its opinion, the court of appeals **"warned"** Smith that he may be subject to sanctions if he makes any further frivolous filings.

Since the court has not been polled to determine whether Smith's appeal is frivolous is a clear indication that the court of appeals was biased in failing to consider the facts and direct evidence of this case which proves beyond any reasonable doubt that the arbitrator engaged in nonjudicial actions.

## III. The Question Presented Is Important

In *Mireles*, the Court addressed whether judicial immunity protected a state court judge from a civil action instituted by an attorney who alleged that the defendant judge ordered police officers to use "excessive force" to seize and compel him into court. In determining its decision, the Court concluded that "judicial and arbitral immunity can be overcome only where the judge (or arbitrator) is engaged in nonjudicial actions or where the judge's (or arbitrator's) actions are taken in the absence of any jurisdiction." The state court judge was granted judicial immunity for actions taken in his judicial capacity. A judge (or arbitrator) is not immune from liability for nonjudicial actions, i.e., actions not taken in judge's (or arbitrator's) judicial capacity.

In this case, the arbitrator engaged in non-judicial actions for actions not taken in arbitrator's judicial capacity on motion for contempt. This case is a rare opportunity for the Court to address the issue previously determined by this Court. Therefore, the Court should grant the petition.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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166 Fed.Appx. 109

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT.

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No. 04-31059
Summary Calendar

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EDWARD SMITH,

Plaintiff-Appellant,

versus

AMERICAN ARBITRATION ASSOCIATION INC.; ET AL.,

Defendants,

AMERICAN ARBITRATION ASSOCIATION, INC.,

Defendant-Appellee.

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Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:04-CV-284

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(Filed February 6, 2006)

Before JOLLY, DAVIS and OWEN, Circuit Judges.

PER CURIAM:*

Edward Smith ("Smith") appeals from the district court's denial of his motion for relief from judgment in

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is no precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

which he challenged the district court's dismissal of his claim against the American Arbitration Association ("AAA") on the basis of arbitral immunity. Smith has filed a motion for leave to proceed in forma pauperis ("IFP") on appeal following the district court's denial of IFP status.

A movant for leave to proceed IFP on appeal must show that he is a pauper and the appeal is taken in good faith, i.e., the appeal presents nonfrivolous issues. *Carson v. Polley,* 689 F.2d 562, 586 (5th Cir. 1982); 28 U.S.C. § 1915(a)(3). Smith asserts that the AAA is not immune from civil liability because the arbitrator engaged in "non judicial action" regarding his motion for contempt. Smith cites to *Mireles v. Waco,* 502 U.S. 9 (1991) in support of his argument.

As the district court determined, Smith's reliance on *Mireles* is misplaced. *Mireles* supports the district court's determination that the arbitrator's actions in the instant case, relating to the disposition of Smith's motion for contempt, was an action taking in the arbitrator's quasi-judicial capacity in the administration of the arbitration proceedings. *See Mireles,* 502 U.S. at 12. As such, the claim against the AAA is barred by arbitral immunity. *See Hawkins v. Nat'l Ass'n of Sec. Dealers, Inc.,* 149 F.3d 330, 332 (5th Cir. 1998). Thus, the district court did not abuse its discretion in denying Smith's motion for relief from judgment. *See Carimi v. Royal Carribean Cruise Line, Inc.,* 959 F.2d 1344, 1345 (5th Cir. 1992).

Smith has failed to show that he will raise any non-frivolous issues for appeal. Accordingly, his IFP motion is DENIED, and his appeal is DISMISSED as frivolous. *See* 5TH CIR. R. 42.2. Smith is WARNED that he may be

subject to sanctions if he makes any further frivolous filings.

MOTION DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.

**UNITED STATES COURT OF APPEALS,**
**FOR THE FIFTH CIRCUIT.**

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No. 04-31059
Summary Calendar

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D.C. Docket No. 3:04-CV-284

EDWARD SMITH,

Plaintiff-Appellant,

v.

AMERICAN ARBITRATION ASSOCIATION INC.; ET AL.,

Defendants,

AMERICAN ARBITRATION ASSOCIATION, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana, Baton Rouge

Before JOLLY, DAVIS and OWEN, Circuit Judges.

JUDGMENT

(Filed February 6, 2006)

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal is dismissed as frivolous.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

333 F.Supp.2d 579

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

EDWARD SMITH

VERSUS — CIVIL ACTION

SHELL CHEMICAL COMPANY, ET AL. — NO. 02-603-B-M1

AND

EDWARD SMITH

VERSUS

AMERICAN ARBITRATION ASSOCIATION, INC., SHELL CHEMICAL PLANT, and BURNS INTERNATIONAL SECURITY — CIVIL ACTION NO. 04-284-B

**RULING**

(Filed Aug. 30, 2004)

This matter is before the Court on the Motion to Dismiss filed by Shell Chemical Plant ("Shell") and Burns International Security ("Burns")[1], and the Motion to Dismiss filed by the American Arbitration Association.[2] For the reasons which follow, the motions are granted, and the case is dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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[1] Rec. Doc. No. 14.

[2] Rec. Doc. No. 17.

## I. Factual Background

The plaintiff, who was directly employed by Burns, filed a lawsuit in Civil Action 02-603 in the Middle District of Louisiana after being released from his position as a night patrol security officer for Shell Chemical Company, alleging that he was terminated because of his race. The plaintiff alleges that although the reason given for his release was due to budget cuts, plaintiff contends that this reason was a pretext for racial discrimination. On October 28, 2002, this Court issued a stay in Civil Action 02-603 pending arbitration proceedings and administratively closed the lawsuit against Shell and Burns.[3]

The plaintiff's claims against Shell and Burns were presented to an arbitrator chosen by both parties to settle this dispute. After reviewing the record, arbitrator Sid Moller issued a written ruling in favor of the defendants. Thereafter, the plaintiff not only filed the present lawsuit (Civil Action 04-484) against Shell and Burns, but also named the American Arbitration Association ("AAA"), seeking relief from judgment under Federal Rule of Civil Procedure 60(b)(3). The plaintiff's complaint includes allegations that the arbitrator mishandled his motion for contempt relating to discovery and denied him the right to a fair hearing.

All defendants have moved to dismiss Civil Action 04-284. Shell and Burns contend that plaintiff has no cause of action under Rule 60(b)(3) as there is no judgment from which to obtain relief, and further contend that plaintiff failed to comply with the service requirements set forth

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[3] Rec. Doc. No. 17.

under the Federal Arbitration Act. The AAA moved to dismiss based on its assertion of arbitral immunity.

## II. Law and Analysis

### A. Motion to Dismiss

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is viewed with disfavor and is rarely granted.[4] A district court cannot dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[5] In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff.[6] In ruling on such a motion, the court cannot look beyond the face of the pleadings.[7] The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is viewed in the light most favorable to the plaintiff and with every doubt resolved in favor of the plaintiff.[8] A plaintiff, however, must plead specific facts, not mere conclusory allegations, to avoid dismissal.[9]

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[4] *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

[5] *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).

[6] *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).

[7] *Baker*, 75 F.3d at 196; *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000).

[8] *Lowrey*, 117 F.3d at 247.

[9] *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

Dismissal is warranted if a plaintiff has (1) been given the opportunity to plead his best case, (2) made specific and detailed allegations constituting his best case, and (3) still fails to state a claim.[10]

### B. Plaintiff has no cause of action under Rule 60(b).

The plaintiff seeks relief pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure, which states: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated as intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . " Considering that the arbitration award is not a "judgment" as contemplated in Rule 60(b)(3), the plaintiff has failed to state a claim upon which relief can be granted under Rule 12(b)(6).

Burns and Shell correctly note that a final judgment has never been rendered by any district court regarding the arbitration award at issue in this litigation. Further, federal case law provides that the Federal Rules of Civil Procedure were "never designed to apply to proceedings in other than the United States District Courts."[11]

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[10] *See Jacquez v. Procunier*, 801 F.2d 789, 792-93 (5th Cir. 1986) (recognizing that dismissal is required if a plaintiff has had fair opportunity to make his case, but has failed); *Morrison v. City of Baton Rouge*, 761 F.2d 242, 246 (5th Cir. 1985) (assuming that the specific allegations of the amended complaint constitute the plaintiff's best case).

[11] *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Company*, 442 F.2d 1234, 1239 (D.C. Cir. 1971).

The defendants contend, and the Court agrees, that the relief sought by plaintiff is actually a request to vacate the arbitration award, and such relief is governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et. seq.* Rule 81(a)(3) of the Federal Rules of Civil Procedure specifically addresses the application of the federal rules to arbitration proceedings:

> In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45 § 159, relating to boards of arbitration of railway labor disputes, **these rules apply only to the extent that matters of procedure are not provided for in those statutes**. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings. (Emphasis added).

The United States Fourth Circuit applied this rule in *Dieulemar Compagnia Di Navigazione v. M/V Allegra*,[12] in refusing to enforce the federal discovery rules in an arbitration proceeding. The *Dieulemar* court stated: "[u]nder Rule 81(a)(3), 'the Federal Rules fill in only those procedural gaps left open by the FAA.'"[13]

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[12] 198 F.3d 473 (4th Cir. 1999).

[13] *Id.*, at 482, *quoting Champ v. Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995).

Similarly, in *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[14] the United States District Court for the Southern District of New York held that Rule 60 was not available to the plaintiffs to overturn an arbitration award, relying on its previous decision in *Cook Chocolate Co. v. Salomon Inc.*[15] The *Hough* court relied on the following language in *Cook*:

> Under Rule 81(a)(3), the rules are extended to cover arbitration proceedings "only to the extent that matters of procedure are not provided for in" the Federal Arbitration Act, 9 U.S.C. Because a motion to vacate an award falls within the scope of "matters of procedure," and because 9 U.S.C. § 9 explicitly provides for this relief, Rule 60(b) is unavailable . . . in contesting the arbitrators' decision.[16]

Thus, the Court finds that the sought relief by plaintiff is not available under Rule 60(b) of the Federal Rule of Civil Procedure. Because the plaintiff's action should have been brought under the FAA, the Court will address plaintiff's action as a motion to vacate the arbitration award pursuant to the Act.

### C. Plaintiff failed to comply with the requirements of the Federal Arbitration Act.

The Federal Arbitration Act ("FAA") provides the exclusive remedy for challenging misconduct in the

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[14] 757 F.Supp. 283 (S.D.N.Y. 1991).

[15] 748 F.Supp. 122 (S.D.N.Y. 1990). (The *Cook* Court ruled on a motion to overturn an arbitration award.)

[16] *Hough*, 757 F.Supp. at 290, *quoting Cook*, 748 F.Supp. at 125.

administration of an arbitration award.[17] Since the FAA is the proper mechanism for the relief sought by the plaintiff, the Court shall address plaintiff's claim as a motion to vacate the arbitration award under the relevant sections of the FAA for the purposes of resolving the pending motion.

A motion to vacate an arbitration award is governed by 9 U.S.C. § 10, which states as follows:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> > (1) where the award was procured by corruption, fraud, or undue means;
> >
> > (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> >
> > (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> . . .

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[17] *Jason v. American Arbitration Association*, 2002 WL 1059005 (E.D. La. May 23, 2002) at *2, *citing Corey v. N.Y.S.E.*, 691 F.2d 1205, 1212 (6th Cir. 1982).

It is clear that the relief which plaintiff seeks in Civil Action 04-284 is contemplated in the above section of the FAA. However, even if plaintiff had properly brought his lawsuit pursuant to this section of the FAA, plaintiff was also required to comply with the requirements of 9 U.S.C. § 12 with regard to notice and service of process. Section 12 provides, in pertinent part, as follows:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney **within three months after the award is filed or delivered**. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service and notice of motion in an action in the same court.... (Emphasis added).

Section 12 clearly requires that a notice to vacate under this Act be served upon the adverse party or his attorney "within three months after the award is filed or delivered." In this case, even if the Court would consider the filing of plaintiff's complaint as sufficient to constitute notice of a motion to vacate, the plaintiff failed to serve the adverse parties in this matter within the three month time period allowed under the Act.

The Fifth Circuit Court of Appeals' decision in *Hudson v. American Arbitration Association*[18] supports the Court's decision. In *Hudson*, the plaintiff submitted his wrongful termination and defamation claims to arbitration under an agreement with his employer. The arbitrator returned a

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[18] 101 Fed. Appx. 947, 2004 WL 1367591 (5th Cir. June 17, 2004).

decision unfavorable to the plaintiff on April 12, 2002, and plaintiff appealed that decision to the district court on February 26, 2003. [19]

The court affirmed the district court's dismissal pursuant to Rule 12(b)(6) because "the relevant statute of limitations provides only three months to appeal from arbitration orders. 9 U.S.C. § 12. As Hudson was appealing an arbitration order rather than a district court order, the district court properly applied § 12 rather than Fed.R.Civ.P. 60(b)."[20]

The arbitration award in the instant matter was signed on January 26, 2004, and was delivered to the plaintiff sometime prior to February 10, 2004, as reflected by the plaintiff's letter[21] to Ms. Molly Bargenquest of the American Arbitration Association wherein the plaintiff requested review of the arbitration award and referenced the award rendered by Sid Moller.

Plaintiff had three months from February 10, 2004, at the latest, to serve notice of his intention to vacate the arbitration award upon the adverse parties. Thus, the adverse parties had to be served by May 10, 2004. The record reflects that Shell was not served until May 13, 2004, and Burns was not served until May 25, 2004.

It is clear to the Court that, even if the Court accepts plaintiff's motion as a motion to vacate the arbitration award pursuant to the FAA, plaintiff has failed to timely serve the adverse parties in accordance

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[19] *Id.*, at *1.

[20] *Id.*

[21] *See,* Rec. Doc. No. 15, Exhibit 6.

with the provisions of the FAA. Since plaintiff's service upon the defendants was untimely, plaintiff's motion for relief from judgment, which the court also treated as a motion to vacate pursuant to the FAA, shall be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

### D. The American Arbitration Association and the theory of arbitral immunity

The American Arbitration Association ("AAA") moved to dismiss plaintiff's claims against it based on the theory of arbitral immunity. The AAA argues that arbitral immunity immunizes such arbitral organizations as itself from civil liability for acts that fall within the scope of the arbitration process. In the plaintiff's opposition to the AAA's motion to dismiss, plaintiff cited the United States Supreme Court decision of *Mireles v. Waco*[22] in support of his contention that the arbitrator was acting in a "nonjudicial" capacity. Plaintiff bases this conclusion upon alleged fraudulent and biased actions taken by the arbitrator against the plaintiff in the administration of the arbitration proceeding, which would fall outside the scope of arbitral immunity.

#### 1. Qualified Immunity

The United States Supreme Court has consistently held that "government officials are entitled to some form of immunity from suits for damages."[23] Generally, these

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[22] 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991).

[23] *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2376, 72 L.Ed.2d 396 (1982).

officials receive only a qualified immunity, which protects them from liability for civil damages if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[24]

Qualified immunity attempts to balance the need to protect officials from harassing and often frivolous lawsuits, with the need to provide relief to those subjected to an abuse of office.[25] Requiring the official to vindicate his actions through a trial costs not only the defendant officials, but also society as a whole, by diverting the official's attention from his duties, deterring citizens from accepting public office, and burdening an already overcrowded and expensive judicial system.[26]

A court must examine an official's behavior to see if he was acting in a capacity for which he possessed discretionary authority. As to actions which arguably fall within the range of permissible actions, absolute immunity protects the official from civil liability for those actions. If, however, the official fails to posit a valid function of office calling for his action, then the act falls outside the scope of his authority, and he must defend the claim.[27]

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[24] *Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc.*, 757 F.2d 676, 686 (5th Cir. 1985), *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2738, 72 L.Ed.2d 396 (1982).

[25] *Id.*, (5th Cir. 1985), *citing Harlow*, 457 U.S. 800, 102 S.Ct. at 2736.

[26] *Id., citing Harlow*, 457 U.S. 800, 102 S.Ct. at 2736.

[27] *Id.*, at 688.

### 2. Applicability of *Mireles v. Waco*

The court must first address plaintiff's misplaced reliance on the *Mireles* decision. In *Mireles*, an attorney brought an action against a state court judge alleging that the judge authorized the use of "excessive force" against the attorney. The attorney alleged that after he failed to appear for the initial call of the Judge's calendar, the Judge ordered the police officers to "forcibly and with excessive force seize and bring plaintiff into his courtroom."[28]

The district court dismissed the action for failure to state a claim, but the Ninth Circuit Court of Appeals reversed and remanded. The United States Supreme Court granted certiorari, and ultimately held that the judge was judicially immune from suit under the circumstances of the case. The Court noted that under this procedure, the Court has extended absolute immunity to a variety of government positions including the President, judges, prosecutors, legislators, and legislative aides acting in their legislative capacity.[29]

Before discussing the merits of the lawsuit, the *Mireles* Court stated as follows:

> Although unfairness and injustice to a litigant may result on occasion, "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."

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[28] *Mireles*, 502 U.S. at 10, 112 S.Ct. at 287.

[29] *Id.* (Citations omitted).

> *Bradley v. Fisher*, 13 Wall. 335, 347, 20 L.Ed. 646 (1972).[30]

The Supreme Court stated the following with regard to the history of official immunity:

> Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages. Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial. . . .
>
> Rather, our cases make clear that the immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction.[31]

Further, the Court noted that the determination of whether an act by a judge is a "judicial" one is "'whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity.'"[32] The Court found that, because the attorney was called into the courtroom for purposes of a pending case, he was dealing with Judge Mireles in the judge's judicial capacity. The Court noted that, "we look to the particular act's relation to a general function normally performed by a judge, in this case the

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[30] *Id.*

[31] *Id.*, at 11-12, 112 S.Ct. at 288.

[32] *Id.*, at 12, 112 S.Ct. at 288, *quoting Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1108, 55 L.Ed.2d 331 (1978).

function of directing the police officers to bring counsel in a pending case before the court."[33]

The plaintiff in the present matter apparently believes the *Mireles* decision supports his proposition that the arbitrator in this matter acted a "nonjudicial" capacity by allegedly acting fraudulently in his administration of the arbitration proceedings. Plaintiff further contends and that such "actions" remove the shield of arbitral immunity. However, as noted in the *Mireles* case, the arbitrator's act of ruling in favor of Burns and Shell, and taking whatever actions the arbitrator took in his capacity as arbitrator, fall squarely within the arbitrator's official function regardless of whether the plaintiff agreed with the arbitrator's actions or decision.

### 3. Applicability of Arbitral Immunity

In *Jason v. American Arbitration Association*,[34] the United States District Court for the Eastern District of Louisiana addressed a motion to dismiss by the AAA. The action arose out of the AAA's arbitral decision between the plaintiff and Halliburton, plaintiffs' employer at a refinery. The plaintiffs claimed that the AAA arbitrator, who issued the awards in favor of Halliburton, was biased in Halliburton's favor. Plaintiffs also argued that the AAA's failure to remove the arbitrator from the case considering plaintiffs' motion to recuse constituted fault and/or a breach of contract. The plaintiffs filed a Motion to Vacate Arbitration Award in state court before the arbitration award was

[33] *Id.*, at 13, 112 S.Ct. at 288-89.

[34] 2002 WL 1059005 (E.D. La. May 23, 2002).

issued, and the AAA timely removed this lawsuit to the Eastern District.[35]

The court noted that "[p]laintiffs' claims are an attempt to enforce civil liability for conduct of the arbitrator and/or the arbitration association AAA during the course and scope of the contractually agreed-upon arbitration proceedings."[36] The AAA asserted the doctrine of arbitral immunity as a shield to the arbitrators and the AAA.

Finding that the AAA was immune from suit under the doctrine of arbitral immunity, the court stated:

> The doctrine of judicial immunity is applicable to the arbitration process and extends to associations such as the AAA. All of the federal courts of appeals that have considered the question have found that **arbitrators enjoy strict arbitral immunity**. Courts have also recognized that public policy strongly favors arbitration, analogizing to the principle of judicial immunity to mold the contours of the corresponding arbitral immunity to suit. The case law is clearly to the effect that **no cause of action can be asserted against an arbitrator based on the issuance of an unfavorable decision.**[37]

The *Jason* court also relied on the Seventh Circuit Court of Appeals decision in *Galuska v. New York Stock Exchange*,[38] quoting the *Galuska* court as follows:

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[35] *Id.*, at *1.

[36] *Id.*, at *2.

[37] *Id.* (Emphasis added).

[38] 210 F.3d 374 (7th Cir. 2000).

> The doctrine of arbitral immunity is rooted in the doctrine of judicial immunity – because an arbitrator's role is considered the "functional equivalent" of a judge's role, courts have uniformly extended quasi-judicial immunity to individual arbitrators. The policies underlying arbitral immunity parallel those underlying judicial immunity – to protect decision makers from undue influence and to protect the integrity of the decision making process.
>
> * * *
>
> Moreover, arbitral immunity attaches to "all acts within the scope of the arbitral process."[39]

Similarly, in *Hawkins v. National Association of Securities Dealers Inc.*,[40] the Fifth Circuit addressed an appeal by a plaintiff whose lawsuit against an arbitrator challenging an arbitration award was dismissed based on arbitral immunity. After plaintiff received an unfavorable arbitration decision, he instituted an action in a Texas state court naming the National Association of Securities Dealers ("NASD") as defendants. The plaintiff alleged that the NASD was biased against him, failed to properly administer the arbitration proceeding, and conspired with the employer to harm and deprive him of a fair arbitration.[41]

The Fifth Circuit upheld the district court's dismissal of the claims against the NASD, stating that, "[t]he NASD enjoys arbitral immunity from civil liability for the acts of

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[39] *Jason*, at *2, *quoting Galuska*, 210 F.3d 374 (citations omitted).

[40] 149 F.3d 330 (5th Cir. 1998).

[41] *Id.*, at 331.

its arbitrators in the course of conducting contractually agreed-upon arbitration proceedings."[42] In further support of this holding, the court noted that "[b]ecause the NASD is immune from civil liability arising from its actions taken in the course of conducting arbitration proceedings, Hawkins has failed to state a claim against the NASD."[43]

The *Hudson v. American Arbitration Association*[44] case is also relevant to this discussion. The Fifth Circuit held in *Hudson* that "[a]ny equal protection claims or claims of misdeeds by the American Arbitration Association are barred by arbitral immunity."[45]

## III. Conclusion

For the reasons set forth above, the Court finds that plaintiff has failed to state a claim upon which relief may be granted under Rule 60(b) of the Federal Rules of Civil Procedure. The Court also finds that, considering plaintiff's motion for relief from judgment as a motion to vacate the arbitration award under the FAA, such motion was not timely served on the adverse parties in contravention of 9 U.S.C. § 12. Finally, the Court specifically finds that the arbitrator in this matter acted in his quasi-judicial capacity in the administration of this arbitration; thus, both the arbitrator and the American Arbitration Association are

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[42] *Id.*, at 332, *citing Corey v. New York Stock Exch.*, 691 F.2d 1205, 1208-11 (6th Cir. 1982); *cf. Austin Mun. Sec., Inc. v. National Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 686-93 (5th Cir. 1985).

[43] *Id.*

[44] 101 Fed. Appx. 947, 2004 WL 1367591 (5th Cir. June 17, 2004).

[45] *Id.*, at *1, *citing Hawkins v. Nat'l Ass'n of Sec. Dealers, Inc.*, 149 F.3d at 332.

immune from civil liability based on the doctrine of arbitral immunity.

Therefore, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Motion to Dismiss filed by Shell Chemical Plant and Burns International Security is granted,[46] and the Motion to Dismiss filed by the American Arbitration Association[47] is granted.

Judgment shall be entered dismissing Civil Action 02-603 and Civil Action 04-284 with prejudice.

IT IS SO ORDERED.

Baton Rouge, Louisiana, August 27, 2004.

/s/ [Illegible]
FRANK J. POLOZOLA,
CHIEF JUDGE
MIDDLE DISTRICT OF
LOUISIANA

[46] Rec. Doc. No. 14.

[47] Rec. Doc. No. 17.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

| | |
|---|---|
| EDWARD SMITH | CIVIL ACTION |
| VERSUS | NO. 02-603-B-M1 |
| SHELL CHEMICAL COMPANY, ET AL. | |
| AND | |
| EDWARD SMITH | CIVIL ACTION |
| VERSUS | NO. 04-284-B✓ |
| AMERICAN ARBITRATION ASSOCIATION, INC., SHELL CHEMICAL PLANT, and BURNS INTERNATIONAL SECURITY | |

JUDGMENT

(Filed Aug. 30, 2004)

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendants and against the plaintiff, dismissing these actions with prejudice.

Baton Rouge, Louisiana, August 27, 2004.

/s/ [Illegible]
FRANK J. POLOZOLA,
CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

[FJP KC SCR
BW Smith Slt
Shaw EoM Darling]

United States District Court
Middle District of Louisiana

| | |
|---|---|
| Edward Smith | Civil Action Number |
| Versus | 04-284-BM1 |

American Arbitration Association,
Shell Chemical Plant, And Burns
International Security Service

Motion for Relief of Judgement

(Filed Sep. 20, 2004)

Now into court comes plaintiff Edward Smith in proper person, and pursuant to 60(b)(3) of the Federal Rule of Civil Procedure, move for on Order relief of this Court Judgment dismissing plaintiff complaint. Court written reason for Judgement that plaintiff Motion for Contempt was ruled on by American Arbitration Association Arbitrator Sid Moller, but plaintiff Motion for Contempt was never ruled on in support of plaintiff motion for relief of judgement see plaintiff attach Memorandum. Motion Denied for reasons previously set forth in the record.

[FJP, KC
Smith
Shaw
Darling]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 04-31059

---

EDWARD SMITH

Plaintiff-Appellant

v.

AMERICAN ARBITRATION ASSOCIATION INC; ET AL

Defendants

AMERICAN ARBITRATION ASSOCIATION INC

Defendant-Appellee

---

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

---

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 6, 2006)

(Opinion 02/06/06, 5 Cir., ___, ___ F.3d ___)

Before JOLLY, DAVIS, and OWEN, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P.

and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-6a

ARBITRATION NO. 691600009903

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AMERICAN ARBITRATION
CASE NO. 691600009903

EDWARD SMITH

VERSUS

SHELL CHEMICAL, ET AL

* * *

The Hearing in the above referenced matter, was taken before and by Charlene H. Simoneaux, a Certified Court Reporter, in the offices of Baton Rouge Court Reporters, Inc., located at 11832 Newcastle Avenue, Suite 16, Baton Rouge, Louisiana, this 8th day of January, 2004, commencing at 9:45 A.M. and ending at 10:53 A.M.

ARBITRATOR PRESIDING:

Mr. Sid L. Moller
2006 McRaven Road
Clinton, MS 39056

APPEARANCES:

| | |
|---|---|
| Mr. Edward Smith<br>2862 73rd Avenue<br>Baton Rouge, LA 70802 | Representing Himself<br>In Proper Person |
| THOMAS W. DARLING<br>Windhorse, Gaudry, Ranson<br>Higgins & Gremillion<br>Oakwood Corporate Center<br>401 Whitney Avenue<br>Suite 500<br>Gretna, LA 70056 | For the Defendants,<br>Burns International<br>Security Service<br>Corporation and<br>Shell Chemical |

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* * *

[29] for your information, I don't have the power to hold a party or an attorney in contempt. I will take your motion as essentially to order the production of documents, order answers to interrogatories, and find that those have been, in fact, provided to you. Have you had any contact with Diane Ratcliff, the case manager, subsequent – after sending this motion in to her?

MR. SMITH: No, sir, I haven't, because I've been on a busy schedule at my job. I work from six to six. My little daughter said she sees a little phone with unknown number calls, and she said it sounds like a lady called, but it has unknown number. And I have not talked to Ms. Ratcliff since that time.

ARBITRATOR: Well, she had indicated to me that she had – and I asked her specifically to contact you to make sure that we did not need to postpone this hearing if, in fact, the – and, of course, that would involve expense, among other things, but if there was a problem with this, you've had the materials for some time – well, let me ask you this. Do you have witnesses that you plan to call?

MR. SMITH: (No response)

ARBITRATOR: Or were you planning on essentially providing your own testimony to make your case?

MR. SMITH: Basically, I was going to – like I [30] said, I was going to prepare my case better when I got a response from the respondent and the due time to prepare my case to see if I needed witnesses or needed further follow-up on something, because some of these production of documents, I could see I need further interrogatories and response on this. And, basically, this –

especially right now with me working so much, I briefly looked at what he sent me, because I signed for it on the 2nd. This is true that an attempt was made on the 31st, but I was working, and there wasn't anybody – my wife wasn't home, either. Anytime she'd be there, she would sign for the documents. And then, again, Mr. Darling said I sent him the interrogatories on November the 2nd or somewhere around that area, but Mr. Darling got these letters – received these interrogatories on October the 21st. That was just almost after – before you sent me one box for me to respond to him by November the 19th. If I could respond to him – you gave me 19 days. He could respond to me from October the 21st. There is no doubt Mr. Darling done that intentionally, and I need time to prepare more better for the things that – that's basically what I was coming down here to explain, the time, because I just got this January the 2nd, and I haven't had time to really look at the documents like I want, because I've been working steady, and I'm not a [31] person, as attorneys do, that have time off and -- that's why I would have liked him to have sent it to me in a good amount of time. But I asked the Arbitrator on the discovery, and that was December the 8th, and if he would have sent it even by that time, I'd have enough time to – just by looking at these documents, I most likely could have prepared my case better. But at this time, he has got me in a position that I need – from looking at some of this stuff, the documents he sent to me, it looks like I need additional information, because so many of these things he did not answer me fully on.

ARBITRATOR: Excuse me. Have you had any conversations with Mr. Darling recently?

MR. SMITH: The only time recently was I had one with him yesterday about the location, and I told him,

I said, yeah, I had found out that Newcastle is off of Sherwood, making a right. He said, okay, thank you. That's good.

ARBITRATOR: Have you made any requests to postpone the hearing?

MR. SMITH: Well, Mr. Arbitrator, like I say, I am not a lawyer, and when I'm in the courtroom – you have the power, but I've been through the court. And my mind was fixed on when you file a motion, the court will – like I said, the arbitration has a different level than what [32] the courts have. If Mr. Darling would have done this in court, he would have been sanctioned for stuff like this, because I done seen attorneys sanctioned for this, for not providing the attorney on the other side a proper defense.

ARBITRATOR: Well, I will say that discovery can result in sanctions. I'm not sure that this particular set of circumstances would qualify unless you – part of the problem we have here, Mr. Smith, is that Mr. Darling has a witness here from Jacksonville, Florida. He has other witnesses on standby, and we really needed to have some advance notice that you'd like to postpone this hearing. Among other things, it would be expensive to postpone it, but I believe that you have had this information in a sufficient amount of time to prepare. I'm going to deny the motion insofar as you're requesting a postponement or a continuance of this hearing. And I don't know that you've made that specific motion. Your motion was to hold him in contempt. As I say, I don't really have that power.

MR. SMITH: Can I – I would like to turn in evidence that – you know, that I did turn in evidence that – let's see.

ARBITRATOR: What specifically are you telling me?

MR. SMITH: Based on that the respondent

* * *

**CASE NUMBER: 04-31059**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**********

**EDWARD SMITH**

Plaintiff-Appellant

**v.**

**AMERICAN ARBITRATION ASSOCIATION INC.**

Defendants-Appellees

**********

**ON APPEAL FROM A RULING OF THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF LOUISIANA**

**PETITION FOR REHEARING EN BANC ON BEHALF OF PLAINTIFF – APPELLANT EDWARD SMITH**

**********

* * *

**ARGUMENT AND AUTHORITIES**

**FEDERAL RULE OF CIVIL PROCEDURE 60(b)(3), ALLOWS A PARTY TO MOVE FOR RELIEF FROM A JUDGMENT OBTAINED BY FRAUD. THE MOTION FOR RELIEF FROM JUDGMENT FILED BY MR. SMITH UNDER FED. R. CIV.P. 60(b)(3), IS FOR RELIEF FROM A JUDGMENT OBTAINED BY FRAUD. IN HIS MOTION MR. SMITH HIMSELF STATES THAT DEFENDANT, THE AAA, "LIED" TO THE COURT IN ITS MOTION TO DISMISS BY STATING THAT "APPELLANT'S MOTION FOR CONTEMPT WAS DIRECTLY ADDRESSED AND REFUTED BY THE ARBITRATOR'S WRITTEN**

**RULING". BECAUSE OF THE MISLEADING FACTS GIVEN BY AAA, THE COURT DISMISSED MR. SMITH'S COMPLAINTS WHICH CONSTITUTES A JUDGMENT OBTAINED BY FRAUD. THE ARBITRATOR FAILED TO TAKE JUDICIAL ACTIONS ON MR. SMITH'S MOTION FOR CONTEMPT, AND ACCORDING TO THE TRANSCRIPT AS EVIDENCE STATES IN HIS OWN WORDS,** "I DON'T HAVE THE POWER TO HOLD A PARTY OR AN ATTORNEY IN CONTEMPT".

**IN** *MIRELES v. WACO, 502 U.S. 9-11 (1991),* **THE SUPREME COURT ADDRESSED WHETHER JUDICIAL IMMUNITY PROTECTED A STATE COURT JUDGE FROM A CIVIL ACTION INSTITUTED BY AN ATTORNEY WHO ALLEGED THAT THE DEFENDANT JUDGE ORDERED POLICE OFFICERS TO USE "EXCESSIVE FORCE" TO SEIZE AND COMPEL HIM IN COURT. IN DETERMINING ITS DECISION, THE COURT CONCLUDED THAT JUDICIAL AND ARBITRAL IMMUNITY CAN BE OVERCOME ONLY WHERE THE JUDGE (OR ARBITRATOR) IS ENGAGED IN NONJUDICIAL ACTIONS OR WHERE THE JUDGE'S (OR ARBITRATOR) IS ENGAGED IN NONJUDICIAL ACTIONS OR WHERE THE JUDGE'S (OR ARBITRATOR'S) ACTIONS ARE TAKEN IN THE ABSENCE OF ANY JURISDICTION". THE STATE COURT JUDGE WAS GRANTED JUDICIAL IMMUNITY FOR ACTIONS TAKEN IN JUDGE'S JUDICIAL CAPACITY. A JUDGE (OR ARBITRATORS) IS NOT IMMUNE FROM LIABILITY FOR NONJUDICIAL ACTIONS, IE., ACTIONS NOT TAKEN IN JUDGE'S (OR ARBITRATOR'S) JUDICIAL CAPACITY.**

**IN THIS CASE THE ARBITRATOR SID MOLLER ENGAGED IN NONJUDICIAL ACTION FOR ACTION NOT TAKEN, TAKEN IN ARBITRATOR JUDICIAL CAPACITY ON APPELLANT MOTION FOR CONTEMPT. THEREFORE THE AMERICAN ARBITRATION ASSOCIATION NOT IMMUNITY FROM CIVIL LIABILITY AND LIABLE INTO APPELLANT FOR DAMAGE, PURSUANT TO DOCKED #32 (SEE EXHIBIBIT** [sic] **B & C) OF THE RECORD FOR REVIEW.**

* * *

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**EXHIBIT 1**

[LOGO] American Arbitration Association
*Dispute Resolution Services Worldwide*

Molly Bargenquest
Vice President
Tracey Hegeman
Assistant Vice President

13455 Noel Road – Suite 1750, Dallas, TX 75240
telephone: 972-702-8222 facsimile: 972-490-9008
internet: http://www.adr.org/

July 23, 2003

Edward Smith
2862 73rd Avenue
Baton Rouge, LA 70807

Thomas W. Darling, Esq.
Windhorst, Gaudry, Ranson, Higgins & Gremillion
401 Whitney Avenue, Suite 500
Gretna, LA 70056

Re: 69 160 00099 03
Edward Smith
and
Burns International Security
– Baton Rouge, Louisiana

Dear Parties:

This will confirm a management conference in the above matter was held on July 23, 2003, and the following arrangements were made:

The dispute involves claims of discrimination due to gender, wrongful termination, and retaliation.

Claimant shall file their witness list on or before **December 8, 2003**.

Respondent shall file their witness list on or before **December 8, 2003**.

Claimant shall designate their expert witness and file a copy of the expert's report on or before **December 8, 2003**.

Respondent shall designate their expert witness and file a copy of the expert's report on or before **December 8, 2003**.

The disclosure of witnesses shall include the full name of each witness, a short summary of anticipated testimony, and written C.V. of experts. If certain required information is not available, the disclosures shall so state.

Discovery will be completed on or before **December 8, 2003**.

Not later than **December 8, 2003**, the parties shall exchange copies of (or, when appropriate, make available for inspection) all exhibits to be offered and all schedules, summaries, diagrams and charts to be used at the hearing. Each proposed exhibit shall be pre-marked for identification and tabbed in 3-ring binders to the extent possible.

The parties shall attempt to agree upon and submit a jointly prepared consolidated and comprehensive set of joint exhibits.

*The Association does not require a set of exhibits for our file.*

The hearing has been scheduled for **January 8 and 9, 2004**. We ask the parties to notify the Association of a mutually agreeable location on or before **October 10,**

**2003**. Absent a response the Association will make the hearing room arrangements.

This case will be administered by facilitating the exchange of appropriate written documents through the AAA. Please submit all correspondence to the undersigned for transmittal to the arbitrator, copying the other party.

All deadlines shown herein will be strictly enforced. After such deadline, the parties may not file such motions except with the permission of the arbitrator, good cause having been shown.

This order shall continue in effect unless and until amended by subsequent order of the arbitrator.

If either party needs subpoenas, you may obtain them from the "Forms" section of our website at the following address:

www.adr.org

If you would like a printed copy of this form please contact the undersigned. Such requests should be made as soon as possible, as the forms need to be completed by the requesting party and signed by the arbitrator. It will be the requesting party's responsibility to have the subpoenas served.

Please be advised this date the employer has been billed the amount as itemized on the enclosed Invoice, pursuant to the rules. Payment is to be received by the Association on or before **December 8, 2003**. Please return the top portion of the invoice with payment. If deposits are not paid on or before **December 8, 2003**, the Association will raise the issue to the opposing party and the arbitrator, if

necessary. The parties are referred to the rules regarding suspension for nonpayment.

If you have any questions, please do not hesitate to call.

Sincerely,

/s/ D. Ratcliff

Diane Ratcliff
Case Manager
800 804 9792
RatcfiffD@adr.org

Geno D. Galantay
Supervisor
972 702 8222
Galantayg@adr.org

DR
Encl.

cc: Sid Moller, Esq. ***VIA FIRST CLASS MAIL***

(2)

No. 05-1446

FILED
OCT 19 2006

In The

# Supreme Court of the United States

EDWARD SMITH,

*Petitioner,*

v.

AMERICAN ARBITRATION ASSOCIATION, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR REHEARING

EDWARD SMITH
2862 73rd Avenue
Baton Rouge, LA 70807
(225) 355-2980
*Pro Se*

October 2006

# TABLE OF AUTHORITIES

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CASES

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CONSTITUTION

United States Constitution Amendment 14 § 1 ..... 1

RULE

Federal Rule of Civil Procedure 60(b)(3) ..... 2

## PETITION FOR REHEARING

Petitioner, Edward Smith ("Smith"), respectfully moves this Court for an order vacating the denial of his petition for a writ of certiorari entered on October 2, 2006, and granting the petition. As grounds for this motion, the Court has failed to uphold the United States Constitution Amendment 14 § 1 by denying Smith equal protection of the law, that allowed the judgment of the lower court to stand which was obtained by fraud in this case.

### I. THE COURT HAS FAILED TO UPHOLD THE UNITED STATES CONSTITUTION AMENDMENT 14 § 1.

The petition for certiorari previously filed herein presented the question whether or not, "the arbitrator engaged in nonjudicial actions," regarding Petitioner's motion for contempt. In support of the question presented which included the transcript as direct evidence, the arbitrator states, "I don't have the power to hold a party or an attorney in contempt." The arbitrator's own words clearly show that he failed to take actions on the motion for contempt in his quasi-judicial capacity. The Petitioner was denied equal protection of the law by this Court that prevented the opportunity to address the issue previously determined in *Mireles v. Waco*, 502 US. 9 (1991).

As provided under the provision of the United States Constitution Amendment 14 § 1 guarantee that no State shall deprive any person of life, liberty or property, without due process of law, nor deny to any person equal protection of the law and requires that the wrongful conduct of private individuals have some connection to state authority to be actionable under the Fourteenth

Amendment. The Petitioner, Edward Smith possess a property interest arising out of his claim is subject to "equal protection of the law," which is not a matter of judicial discretion but of a fundamental right.

## II. FEDERAL RULE OF CIVIL PROCEDURE 60(B)(3), PROVIDES THAT THE COURT MAY RELIEVE A PARTY FROM A FINAL JUDGMENT FOR FRAUD.

In this case, Smith alleges that the award by the American Arbitration Association ("AAA") was obtained by fraud, as a result of the arbitrator failing to take judicial actions on his motion for contempt, and according to the transcript as direct evidence states in the arbitrator's own words, "I don't have the power to hold a party or an attorney in contempt." Petitioner filed suit in district court, named as a defendant, the AAA, "**LIED**" to the court in its motion to dismiss by stating that, "Petitioner's motion for contempt was directly addressed and refuted by the arbitrator's written ruling." Because of the misleading of facts given by the AAA, the court dismissed Petitioner's complaint which constitutes a judgment obtained by **fraud.** *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 997 (1944).

Furthermore, the Respondent in this case could not produce any evidence to the court to show that the Petitioner's motion for contempt was directly addressed and refuted by the arbitrator.

The Court may relieve a party from a final judgment for fraud as provided under the Federal Rule of Civil Procedure 60(b)(3). The lower court judgment obtained by

fraud cannot be allowed to be maintained, as a matter of law or a matter of equity.

## CONCLUSION

For the reasons set forth in this Petition for Rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

EDWARD SMITH
2862 73rd Avenue
Baton Rouge, LA 70807
(225) 355-2980
*Pro Se*

October 18, 2006

## CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44-2.

EDWARD SMITH